2002

Utah v. Adrian Whitfield Gordon : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
ADRIAN WHITFIELD GORDON,	:	Case No. 20020332-SC
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for murder, a first-degree-felony offense under Utah Code Ann. § 76-5-203 (Supp. 2002), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW 1

PRESERVATION OF SUFFICIENCY ISSUE 2

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS 4

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 5

SUMMARY OF THE ARGUMENT 14

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION. 15

A. THE STATE WAS REQUIRED TO ESTABLISH GORDON'S INVOLVEMENT IN THE CRIME. 18

B. THE MARSHALED FACTS FAIL TO SUPPORT THE TRIAL COURT'S FINDINGS FOR MURDER. 23

1. The Marshaled Evidence Does Not Support the First Set of Findings. 30

2. Additional Findings Make Improper Inferences and Are Irrelevant. This Court Should Reject Those Findings as Speculative and Remote. 34

Page

3. The Remaining Findings Relate to the Eyewitness Identification. As this Court Is Aware, Such Evidence Should Be Treated with Caution. Here, Certain Facts Identified by the Eyewitness Are Inconsistent with the Video. Also, the Eyewitness Was Influenced by an Unrelated Third Party in His Testimony. The Eyewitness Testimony Here Is Insufficient to Support the Conviction. 39

C. IN THE EVENT THIS COURT DETERMINES THAT THE SUFFICIENCY ISSUE WAS NOT PRESERVED, IT MAY REACH THE MERITS OF THE MATTER UNDER THE PLAIN-ERROR ANALYSIS OR THE EXTRA-ORDINARY-CIRCUMSTANCES DOCTRINE. 46

CONCLUSION 50

Addendum A: Judgment
Addendum B: Transcript Excerpts Containing Trial Court's Findings and Verdict
Addendum B: Text of Relevant Provisions

TABLE OF AUTHORITIES

Page

CASES

Ashton v. Ashton, 733 P.2d 147 (Utah 1987) 17

Hart v. Salt Lake County Commission, 945 P.2d 125 (Utah Ct. App.), cert. denied, 953 P.2d 449 (Utah 1997) 4

Lemon v. Coates, 735 P.2d 58 (Utah 1987) 17

Reed v. State, 197 So. 2d 811 (Miss. 1967) 38

State v. Arroyo, 796 P.2d 684 (Utah 1990) 17

State v. Boyd, 2001 UT 30, 25 P.3d 985 18

State v. Brown, 948 P.2d 337 (Utah 1997) 19

State v. Bullock, 791 P.2d 155 (Utah 1989), cert. denied, 497 U.S. 1024 (1990) 47

State v. Clayton, 646 P.2d 723 (Utah 1982) 20

State v. Dunn, 850 P.2d 1201 (Utah 1993) 4, 47

State v. Eldredge, 773 P.2d 29 (Utah 1989) 47

State v. Featherson, 781 P.2d 424 (Utah 1989) 17

State v. Gonzales, 2000 UT App 136, 2 P.3d 954 48

State v. Goodman, 763 P.2d 786 (Utah 1988) 49

State v. Holgate, 2000 UT 74, 10 P.3d 346 ..... 2, 3, 4, 47, 48

State v. Hopkins, 1999 UT 98, 989 P.2d 1065 18

Page

State v. Isaacson, 704 P.2d 555 (Utah 1985) 15, 17

State v. James, 819 P.2d 781 (Utah 1991) 19, 20

State v. Jonas, 725 P.2d 1378 (Utah 1986) 40

State v. Larsen, 2000 UT App 106, 999 P.2d 1252 49

State v. Long, 721 P.2d 483 (Utah 1986) 40, 41, 44, 45, 48

State v. Mead, 2001 UT 58, 27 P.3d 1115 18

State v. Merila, 966 P.2d 270 (Utah App. 1998) 19, 48

State v. Nickles, 728 P.2d 123 (Utah 1986) 18

State v. Petree, 659 P.2d 443 (Utah 1983) 15, 17, 20, 21, 22, 23, 30, 46, 48

State v. Spainhower, 1999 UT App 280, 988 P.2d 452 19

State v. Span, 819 P.2d 329 (Utah 1991) 18

State v. Tanner, 675 P.2d 539 (Utah 1983) 15, 17

State v. Verde, 770 P.2d 116 (Utah 1989) 47

State v. Walker, 743 P.2d 191 (Utah 1987) 2, 16, 17, 18, 40, 48, 49

State v. Workman, 852 P.2d 981 (Utah 1993) 19

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 16, 40

Page

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 76-5-203(a) (1953 as amended) 23

Utah Code Ann. § 76-5-203 (Supp. 2002) 1, 4, 15, 18

Utah Code Ann. § 77-17-3 (1999) 2, 4, 47, 49

Utah Code Ann. § 77-35-26(g) (1982) 16

Utah Code Ann. § 77-35-26(7) (Supp. 1988) 49

Utah Code Ann. § 78-2-2(3)(i) (Supp. 2002) 1

Utah R. App. P. 24(a)(9) (2002) 18

Utah R. Civ. P. 52 (2002) 2, 4, 15, 16, 17, 49

Utah R. Civ. P. 81(e) (2002) 24, 16, 49

Utah R. Crim. P. 31 (2002) 16

U.S. Const. amend. XIV 38

MISCELLANEOUS

R. Buckhout, *Eyewitness Testimony*, 15 Jurimetrics J. 171, 179 (1975) (reprinted from 231 Scientific American 23 (Dec. 1974)) 41

E. Loftus, *Eyewitness Testimony* (1979) 40

P. Wall, *Eyewitness Identification in Criminal Cases* (1965) 40

Wright & Miller, *Federal Practice and Procedure § 2585* (1971) 16

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2-2(3)(i) (Supp. 2002), whereby a defendant in a criminal case may take an appeal to the Supreme Court from a final judgment/conviction for a first-degree-felony offense. Appellant Adrian Gordon was convicted of murder, a first-degree-felony under Utah Code Ann. § 76-5-203 (Supp. 2002), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie Lewis, presiding. A copy of the judgment is attached as Addendum A.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issue presented for review is as follows: Whether the trial court erred in its findings and its ultimate determination that the state presented sufficient evidence to establish that Gordon committed murder.

STANDARD OF REVIEW: This Court will apply the "clearly erroneous" standard in reviewing the verdict and the findings of fact from a bench trial in a criminal case. State

v. Walker, 743 P.2d 191, 192-93 (Utah 1987). That standard provides the following: "if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside." Id.

PRESERVATION OF SUFFICIENCY ISSUE

This case was tried to the bench. After the state presented evidence in the matter, the parties made their closing arguments. The defense argued to the court that the evidence failed to support that defendant committed the homicide at issue. (R. 210:512-523.) Thereafter, the trial judge entered findings of fact and rendered a guilty verdict. (R. 211:536-48.) A copy of the transcript containing the trial court's findings and verdict is attached hereto as Addendum B. Gordon maintains that the trial court erred in its ruling.

The trial proceedings adequately preserved the sufficiency issue in this case for purposes of appeal. Although defense counsel did not make a separate motion to dismiss the charge for insufficient evidence (see R. 210:499-504), in the context of this case, where the trial court was the fact finder, such a motion would serve no relevant purpose. It would be superfluous where the defense asked the court in closing argument to enter a judgment of acquittal. See Utah Code Ann. § 77-17-3 (1999); Utah R. Civ. P. 52(b) and 81(e) (2002).

In State v. Holgate, 2000 UT 74, 10 P.3d 346, this Court considered whether a defendant must specifically move to dismiss a charge in the trial court to preserve the sufficiency issue for appeal. This Court stated, "As a general rule, claims not raised before

the trial court may not be raised on appeal." Id. at ¶11. Also, "the preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." Id.

In Holgate, this Court applied the preservation rule to a sufficiency claim in a case where the jury was the fact finder. It specified that the preservation rule serves two purposes. First, "'[I]n the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it.'" Id. (cite omitted). In Gordon's case, the trial court was the fact finder and was apprised of the evidence and the elements of the crime. The trial court made findings in Gordon's case and rendered a decision on the ultimate issues. The first purpose of the preservation rule as identified in Holgate is served here: the trial court was given an opportunity to consider the sufficiency of the evidence.

Second, the Court stated that defendant "should not be permitted to forego making an objection with the strategy of 'enhanc[ing] the defendant's chances of acquittal and then, if that strategy fails, ... claim[ing] on appeal that the Court should reverse.'" Id. (cite omitted). The second "purpose" does not seem to apply in the context of a bench trial. In the proceedings below, defendant did not "forego an objection" at trial and simultaneously ask the court to enter a verdict of acquittal. Indeed, in the context of a bench trial, it seems that a motion to dismiss for insufficient evidence would be redundant and unnecessary.

Stated a different way, no procedural purpose is served by requiring the defendant in a bench trial to make a motion to dismiss for insufficient evidence, where the trial court is already required to make the fact findings and to render a verdict. See Utah Code Ann. §

77-17-3 (requiring trial court to discharge defendant when the evidence is insufficient); Utah R. Civ. P. 52(b) & 81(e). The defendant in that instance has not abandoned the sufficiency argument to enhance his chances with the trial court; rather, the defendant has argued the matter to the trial court as fact finder in the context of the bench trial.

In Gordon's case, the trial court had the opportunity to consider the evidence. The court made findings of fact and ruled that Gordon was guilty. (R. 211:536-48; Addendum B.) "A matter is sufficiently raised if it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue." Hart v. Salt Lake County Comm'n, 945 P.2d 125, 129 (Utah Ct. App.) (quotations/cites omitted), cert. denied, 953 P.2d 449 (Utah 1997). The sufficiency issue here was properly preserved below and is subject to review on appeal.

In the alternative, this Court may reach the merits of Gordon's sufficiency issue under the "plain error" analysis and/or the "exceptional circumstances" doctrine. The "plain error" analysis applies when an error exists; the error is obvious to the trial court; and the error is harmful. See State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993). "Plain error" exists here, as further set forth below. (See infra, Argument, subpart C.1.) Also, the exceptional-circumstances doctrine applies "'to rare procedural anomalies.'" Holgate, 2000 UT 74, ¶12 (cite omitted). The bench trial in this case is a rare procedural anomaly as contemplated by this Court in Holgate, and as further set forth below. (See infra, Argument, subpart C.2.)

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions will be determinative of the issue on appeal: Utah Code Ann. §§ 76-5-203 (Supp. 2002) and 77-17-3 (1999); Utah R. Civ. P. 52 and 81(e) (2002).

The text of those provisions is contained in Addendum C.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition in the Court Below.

In October 2001, the state filed an Information against Gordon for murder. (R. 3-5.) During pre-trial proceedings, Gordon requested a bench trial. (R. 30; 106; 205:3-5; 207:9-11, 16-17.) The trial court commenced the trial on December 17, 2001. (R.110; 208.) The trial lasted three days, and the judge pronounced the guilty verdict on the fourth day, December 20, 2002. (R. 211; 123.) Thereafter, the trial court ordered Gordon to serve a prison term. (R. 179.) On April 15, 2002, Gordon filed a Notice of Appeal. (R. 181.)

STATEMENT OF FACTS

The state prosecuted Adrian Gordon for the murder of Lee Lundskog. It presented the following evidence at trial. Lundskog was a resident of Green Gables, a living facility in North Salt Lake. (R. 208:26.) He suffered from a compulsive disorder. (R. 208:57.) Lundskog was not employed. He received a daily allowance in order that he could make several purchases at a nearby 7-Eleven, Food-4-Less and Chevron. (R. 208:29-33; see also 208:58.) Lundskog also gave his money away to other residents. (R. 208:57.)

On Saturday, September 29, 2001, an unknown person reported finding Lundskog's body behind the dumpster at the 7-Eleven store on 13th North and Redwood Road in Salt Lake City. (R. 209:296.) The state called the 7-Eleven store manager to testify at trial. Cathy Burget described the store. It sits at the back of a large corner lot on the west side of

Redwood Road. (R. 208:38.) It is equipped with an in-store security camera system (R. 208:39, 47-48) that records events inside the store.

Burget also described the lighting around the store on September 29. The lighting near the dumpster area north of the store was "pretty good" if "you're closer" to the dumpster, 3 or 4 feet away. (R. 208:43-44.) Further from the dumpster, the lighting was poor. (Id.) On September 29, 2001, after Lundskog's death, officers called Burget to retrieve the security tape for them. (R. 208:41-42.) The tape was placed in evidence.

Next, the state called Gustavo Diaz-Hernandez to testify. On September 29, 2001, at 5:30 a.m., Hernandez walked to the 7-Eleven store on Redwood Road to meet a friend, who was driving him to work. (R. 208:60-61.) It took Hernandez 5 minutes to walk to the store. (R. 208:76.) According to Hernandez, the area north of the store near the dumpster was "[n]ot very well lighted." (R. 208:61-62.) He testified that the store "now" has lights on the north side of the building, "[b]ut I don't think it had any on" September 29. (R. 208:62.)

At approximately 5:35 or 5:36 (R. 208:76-77), Hernandez was walking on the sidewalk on the northwest side of the store when he heard a sound "like somebody was kicking" or stomping. (R. 208:64-65.) He did not pay "really close attention" to the sound; he "kept on walking." (Id.) When Hernandez reached the street entrance to the store parking area, he turned and saw someone stomping on a person on the ground. (R. 208:64, 67-68.) Hernandez "didn't pay very much attention." (R. 208:68.) He continued along the sidewalk and stopped at the street corner. He observed more stomping. (R. 208:75-76.) Hernandez

made his observations in the dark from a distance of 75 and 142 feet respectively. (R. 209:303; 210:396-97.) The attack occurred on a grassy strip on the northwest side of the 7-Eleven behind a dumpster. (R. 208:113; State's Exhibit 23.) Hernandez believed the assailant kicked the man about 8 or 9 times and then "four times" with his right foot. (R. 208:68-69, 74-75.)

Hernandez described the assailant as African-American and muscular with short hair; he testified that the assailant wore a white, collarless, loose shirt with short sleeves, loose shorts above the knees, and white tennis shoes and socks. (R. 208:70-72; but see 208:127 ("nothing could be seen").) Hernandez crossed Redwood Road and then stopped. He continued to witness the incident. (R. 208:76.) He was approximately 282 feet from the dumpster area. (R. 209:374.) He testified that once he reached the 7-Eleven area, it took him 2½ minutes to walk along the sidewalk and across Redwood Road; then he waited for 7 or 8 minutes for his ride to work. (R. 208:76-77.)

From across Redwood Road, Hernandez observed the assailant walk toward the 7-Eleven. (R. 208:78.) Hernandez could see blood reflecting off the assailant's white shoes (R. 208:78-80, 126). The assailant went inside the store, and almost immediately thereafter, a four-door Nissan or Chevrolet car pulled into the parking area from the south. (R. 208:81-83.) The assailant then emerged from the store with two plastic bags in his hands (2 ½ feet by 18 inches in size), and he walked toward the car. (R. 208:83-84.) He opened a door to the back seat and placed the bags inside the car. The assailant then walked to the dumpster

area, and stomped on the victim as before, "seven or eight times." (R. 208:85.)

According to Hernandez, the assailant did not get into the car. Rather, he walked up the street and north on Redwood Road, while the Nissan/Chevrolet four-door drove slowly beside him. (R. 208:86.)

Josefina Silva arrived for Hernandez. It took them 10 to 12 minutes to drive to work. (R. 208:92.) Hernandez punched in at work at 5:55 a.m. (R. 208:129-130.)

Hernandez testified that Gordon resembled the assailant. (R. 208:100-02.) Hernandez admitted that when he was interviewed by police in October, he could not identify the assailant from a police photo lineup, which included Gordon's picture. (R. 208:104, 107-09.)

Significantly, Hernandez did not immediately report the crime to police. Instead, he told his friend/cousin, Jose Lopez, about the incident. (R. 208:93-94, 97.) Lopez went to police and reported the events as though he had personally witnessed them. Officers showed the 7-Eleven video tape to Lopez. Lopez would have seen Gordon leave the store at 5:27 and enter again at 5:31. He identified Gordon as the person who committed the crime. (R. 208:163-68, 179; see 208:138; 210:409; 210:459.) Later, Lopez discussed the video tape with Hernandez before Hernandez met with police, and Lopez described Gordon to Hernandez. (R. 208:137-38.) At trial, Lopez admitted that he lied to police. (R. 208:175-77.)

Next, Dr. Todd Grey testified to Lundskog's cause of death. Lundskog suffered "multiple injuries of the head and face. Specifically, he had extensive bruising" and multiple abrasions/scrapes involving mostly the right side of the face. (R. 209:216-17.) He had

fracturing of the right cheek and the jaw on both sides, and a fracture of the skull. He had blood accumulation, hemorrhaging, and bruising, as well as other injuries. He also suffered "hemoaspiration or breathing of blood, indicating that he was alive and breathing for some period of time after these injuries of the head and face were sustained." (R. 209:217.) Dr. Grey opined that the manner of death was homicide and the cause was craniocerebral injuries (id. at 218-19). He considered the injuries to be consistent with someone stomping on the victim's head. (Id. at 220.)

The state called witnesses, who patronized the 7-Eleven store that morning. Augustin Castaneda-Velasquez and a co-worker were at the store at 5:29:55 a.m. to get money from an automatic cash machine, and for gasoline and coffee. (R. 209:228-31.) Velasquez did not see or hear anything unusual at the store. (R. 209:233-34.)

Robert Mellen stopped at the 7-Eleven that morning for coffee. (R. 209:237.) He knew Lundskog from previous visits there, and he often saw Lundskog outside, south of the building smoking a cigarette and drinking a Coca-Cola. (R. 209:237-38.) Mellen saw Lundskog at the door asking the clerk's permission to smoke outside and drink his soda. (R. 209:240.) Mellen also testified that Gordon came into the store for a straw. (Id.)

Mellen paid for his coffee, walked out of the store and got into his truck. (R. 209:240-41.) He noticed Gordon looking at him "pretty hard." (R. 209:241, 254, 262.) As Mellen backed out of the parking space, he observed Gordon waving to Lundskog, who was south of the building, as though Gordon wanted to talk to Lundskog. (R. 209:241-42.) Mellen did

not see Lundskog respond. (R. 209:258.) He saw no contact between Gordon and Lundskog. (R. 209:258.) Mellen testified that Gordon wore a white T-shirt, long-denim shorts, and "really white" shoes. (R. 209:251.)

The state called Steven Butcher to testify. Butcher lived in an apartment complex behind the 7-Eleven to the southwest. (R. 209:265-66.) A wall/fence ran behind the 7-Eleven and the apartment building. (R. 209:266.) At approximately 5:45 in the morning, Butcher went to the 7-Eleven. (R. 209:268.) It was dark. He intended to take a shortcut to the store through a hole in the fence. (R. 209:268.) After Butcher walked through a gap in the fence, he was aware of a person lying on the ground behind the dumpster area. (R. 209:269.) Butcher believed the man was sleeping. He could hear him snoring and saw his chest moving as in sleep. (R. 209:270.) Butcher retraced his steps through the fence, and walked around the block to the 7-Eleven. (R. 209:271, 280.) When he reached the store, he checked the man behind the dumpster and thought he was passed out. Butcher then went into the store. (R. 209:271, 273.) When Butcher left the store, he again walked by the man behind the dumpster. He could hear him snore. (R. 209:274.) Butcher returned to his apartment. (Id.) He became aware of a problem at the store at around 6:15 to 6:30, when he saw emergency vehicles in the area. (R. 209:274-75.)

Butcher testified that the distance from the sidewalk to the store (where Hernandez first heard stomping) was such that a person could not see behind the dumpster even "if it was daylight." (R. 209:283.) Butcher identified on State's Exhibit 23 how close he had to

get to the scene to see the man on the ground. (R. 209:283; State's Exhibit 23 ("x").) Even up close, it was so dark that Butcher could not see the man's face. (R. 209:283-84.)

The state called the investigating officers to testify. Teresa McKinnon arrived at the scene at 6:40. (R. 209:294.) She observed bloody footprints on the curb near the dumpster and in parking stalls. (R. 209: 290.) The prints were from the right sole of a "Reebok" shoe. (R. 209:291-92.)

Officer Jason Snow processed the scene. He testified that he calculated the distance behind the dumpster to the sidewalk (where Hernandez first heard the stomping) to be 75 feet. (R. 209:303.) Also, he observed bloody shoe prints (R. 209:304) that measured 12 inches long. (R. 209:336.) Snow collected swabs of blood from the scene that tested positive for human blood. (R. 209:351.)

Snow processed a car belonging to Gordon's girlfriend, Denise Quintana. The car was a gold, two-door Honda Accord. (R. 209:320-21.) Snow found nothing in the car. (R. 209:322-23; see also 209:353.) Also, there was no evidence of blood on the floor inside the 7-Eleven. (R. 208:51; 209:331.)

Snow retrieved Lundskog's wallet from his back pocket. It had no signs of blood on it and there were no signs of tampering with the wallet or Lundskog's body. (R. 209:332-33.) Lundskog was found lying on his back. (R. 210:403.)

Finally, additional evidence presented by the state included the following: Witnesses described events on the 7-Eleven videotape. At 4:51:55 a.m., Lee Lundskog was at the store

and purchased two Big Gulps. (R. 210:423-24.) At 5:03 in the morning, Jose Lopez entered the store. At 5:09:43, he left. (R. 208:96-97; 210:425.) At 5:20:45 a.m., Gordon came within view of the 7-Eleven camera. (R. 210:426-28.) He was wearing a light blue T-shirt. He appeared to set something on the ground outside, he opened the door, then he bent down to pick something up. (R. 210:427.)

At 5:22:22, Mellen pulled into the parking space in front of the store. (R. 210:428.) At 5:24:46, Gordon was standing near the magazine rack, using the telephone. Gordon placed the receiver in the cradle, "bent down and picked up items," and walked "back to the south." (R. 210:429.) Also, at that point, Mellen was at the counter making purchases (R. 210:430), and Lundskog was at the door with two drink cups. (R. 210:430-31.)

According to the video, Lundskog opened the door for Gordon and stepped out of the way to allow Gordon to leave the store. (R. 210:431.) Gordon walked to the left of the screen, or to the north side of the store. (R. 210:431-32.) At 5:25:38 a.m., Gordon walked back into the store carrying a cup. (R. 210:432.) He was wearing a lighter-colored shirt and shorts. (R. 210:433.) At 5:25, Mellen left the store, and Gordon walked out of the store, going eastbound. It appeared on the tape as though Gordon was looking toward Mellen's truck. (R. 210:434-35.) Mellen backed up and left the parking lot at 5:26:09. (R. 209:259-60; 210:435.)

At 5:27:21, Lundskog crossed the video screen, walking to the north along the front of the store. (R. 210:436; 209:261.) At 5:29:30, a car pulled into the store parking lot. At

5:29:44, an unidentified "male Caucasian" entered the store, and at 5:30:01, Velasquez and his co-worker entered the store. (R. 210:437-38; 209:228-31.) At 5:31:18, Gordon walked across the screen from left to right, or north to south, and he entered the store. (R. 210:439.) As Gordon walked to the phone and made a call, another car pulled into view in the parking lot, and a man walked in. It was 5:31:36. (R. 210:482-83.) At 5:32:08, a car pulled into the parking area, presumably Denise Quintana. Gordon set the telephone receiver down, left the store and walked to the north. (R. 210:440-41.) It was 5:32:16. (R. 210:441.) Gordon did not carry any bags out of the store. (R. 210:466.)

The prosecutor jumped ahead in the video to 5:46:22. (R. 210:441.) Butcher entered the store. (R.209:278; 210:441.) At approximately 5:47 a.m., an African-American male in a white T-shirt and plaid shirt walked into the store, then out. (R. 210:442-43.) Butcher made his purchases and left at 5:48:25. (R. 209:278-79, 281; 210:443-44.) At 5:49 the African-American man returned to the store and then left. (R. 210:444-45.) At that point, the prosecution stopped the video and discontinued the narrative. (Id.)

According to police records, at 6:21, an unidentified person reported the body behind the 7-Eleven dumpster. (R. 209: 296.)

Detective Prior testified that he interviewed Gordon. Gordon was 20 years old. He told the officer his sister dropped him off at the store, and he telephoned Quintana to pick him up. (R. 210:449-50.) Gordon had been staying with Quintana at her grandmother's house for the past week. (R. 210:451.) Gordon was wearing gray Nike shoes that morning.

(R. 210:453.) When Quintana arrived, Gordon left the store and went home. (R. 210:453-54.)

Officers examined white Reeboks that belonged to Gordon. The soles of the shoes did not match the prints at the scene, and the shoes had no blood on them. (R. 210:500.) Based on the foregoing, the trial judge found Gordon guilty of murder. This appeal follows.

SUMMARY OF THE ARGUMENT

At the conclusion of a bench trial, Gordon was convicted of murder. The primary factual issue at trial concerned the identification of the assailant. In this case, the trial court stated that none of the "pieces of evidence" alone would suffice to convict Gordon of the offense. (R. 211:537.) Nevertheless, the judge ruled that certain facts combined supported the conviction, and the judge made findings of fact regarding the matter.

Gordon is challenging some of the findings on appeal. He has separated the challenged findings into three categories: With respect to the first set of challenged findings, Gordon maintains they are not supported by the evidence. The marshaled facts compel the determination that the first set of challenged findings must be rejected.

The second set of findings consists of irrelevant findings and/or improper inferences. This Court should find that the circumstantial evidence allegedly supporting the second set of findings is of such deficient quality and quantity as to cause this Court to be left with the definite and firm conviction that a mistake has been made in the matter.

The third set of findings relates to the eyewitness testimony of Hernandez. As this

Court is aware, the uncorroborated testimony of a single witness as the linchpin for the prosecution raises serious questions. Hernandez testified that he observed criminal conduct on September 29. His perception of the matter and the events he described are in conflict in relevant part with information captured on the surveillance camera at the 7-Eleven. Hernandez's testimony raises serious doubts as to whether Gordon committed the homicide. On that basis, this Court should reverse the conviction in this case for insufficient evidence.

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

Gordon was convicted of murder, a first degree felony offense under Utah Code Ann. § 76-5-203. The case was tried to the bench. Gordon maintains that the evidence at trial was insufficient to support the conviction. In considering a sufficiency claim after a bench trial, this Court has stated it will apply the "clearly erroneous" standard, as follows:

> This Court has had a well-established standard of review of verdicts in criminal cases, which we have applied to both jury and bench verdicts. When reviewing the sufficiency of evidence supporting a conviction, we have said that we will overturn a verdict "only when the evidence is so lacking and insubstantial that a reasonable person could not have reached that verdict beyond a reasonable doubt." State v. Isaacson, 704 P.2d 555, 557 (Utah 1985); State v. Tanner, 675 P.2d 539, 550 (Utah 1983); State v. Petree, 659 P.2d 443, 444 (Utah 1983) (review of a jury verdict).
>
> On January 1, 1987, however, new Utah Rule of Civil Procedure 52(a) took effect, providing:
>
> > In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact, whether based on oral or documentary evidence, shall not be*

set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

(Emphasis added.) Rule 52(a) applies in criminal cases by virtue of *Utah Code Ann. § 77-35-26(g)* (1982), which provides: "The rules of civil procedure relating to appeals shall govern criminal appeals to the Supreme Court except as otherwise provided." *See also* Utah R. Civ. P. 81(e) (civil procedure rules apply in the absence of contradictory rule of criminal procedure).[1]

The language of Rule 52(a) is similar to the Federal Rules of Civil Procedure. Federal case law has defined the standard of review in the federal rule and Wright & Miller summarizes that standard as follows:

> [I]t is not accurate to say that the appellate court takes that view of the evidence that is most favorable to the appellee, that it assumes that all conflicts in the evidence were resolved in his favor, and that he must be given the benefit of all favorable inferences. All of this is true in reviewing a jury verdict. It is not true when it is findings of the court that are being reviewed. Instead, the appellate court may examine all of the evidence in the record. It will presume that the trial court relied only on evidence properly admissible in making its finding in the absence of a clear showing to the contrary. It must give great weight to the findings made and the inferences drawn by the trial judge, but it must reject his findings if it considers them to be clearly erroneous.

Wright & Miller, *Federal Practice and Procedure* § 2585 (1971) (citations omitted.)

The definition of "clearly erroneous" in the federal rule comes from United States v. United States Gypsum Co., [333 U.S. 364, 395] (1948):

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Further clarification is offered by Wright & Miller:

> The appellate court .... does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a

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[1] The legislature has since repealed Utah Code Ann. § 77-35-26. Notwithstanding the repeal, the "clearly erroneous" standard applicable to "findings of fact" and identified in Rule 52(a), Utah R. Civ. P., continues to apply in a sufficiency claim where the criminal case has been tried to the bench. The standard applies by virtue of Walker, 743 P.2d at 193 ("we will hereafter apply the [clearly erroneous] standard adopted in this case to [findings and verdicts entered in] bench trials in criminal cases"), and by virtue of Rule 81(e), Utah R. Civ. P., and Rule 31, Utah R. Crim. P. Rule 81(e) provides for the application of the rules of civil procedure in criminal cases; and Rule 31 allows the court to proceed in a lawful manner "not inconsistent with these rules or statutes," thereby affirming the standard in Walker.

> different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.
>
> Thus, the content of Rule 52(a)'s "clearly erroneous" standard, imported from the federal rule, requires that if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside.
>
> Although we have applied the new Rule 52(a) since its effective date, see, *e.g.*, Ashton v. Ashton, 733 P.2d 147 (Utah 1987); Lemon v. Coates, 735 P.2d 58 (Utah 1987), we have not examined the impact of drawing from the federal rules in the promulgation of our new Rule 52. Therefore, we disavow language in our earlier cases describing or implying a standard under new Rule 52(a) which differs in any significant respect from the standard of review applied in this case. We further specify that we will hereafter apply the standard adopted in this case to bench trials in criminal cases, and not the standard in State v. Isaacson, State v. Tanner, and State v. Petree. In that regard, we abandon the pre-Rule 52(a) position that the standard of review in criminal cases must be the same for both jury and bench verdicts. Not only does Rule 52(a) require this shift, but also we believe it to be an appropriate recognition of the relative deference owed to multi-member panel decisions as opposed to single-judge findings.

Walker, 743 P.2d at 192-93.

The "clearly erroneous" standard is applicable here. That standard provides that even if evidence supports certain findings, this Court will determine whether the findings are against the clear weight of the evidence, and/or it will review the remaining evidence to determine whether a mistake has been made. Id. at 193; State v. Arroyo, 796 P.2d 684, 687 (Utah 1990) ("A finding not supported by substantial, competent evidence must be rejected"). The "clearly erroneous" standard is not a de novo review. It gives "due regard to the opportunity of the 'trial court to judge the credibility of the witnesses.'" State v. Featherson, 781 P.2d 424, 432 (Utah 1989) (citing Utah R. Civ. P. 52(a)).

Also, the standard as set forth in Walker is not inconsistent with the marshaling requirement. Under the marshaling requirement, the appellant must "marshal all record evidence that supports the challenged finding" of fact. Utah R. App. P. 24(a)(9) (2002) (effective November 1, 1999); see also State v. Boyd, 2001 UT 30, ¶13, 25 P.3d 985 (citing State v. Hopkins, 1999 UT 98, ¶14, 989 P.2d 1065).

Under the "clearly erroneous" standard applicable to this case, the trial court's findings are improper. They must be set aside, as set forth below, thereby rendering the verdict insupportable and ineffective.

A. THE STATE WAS REQUIRED TO ESTABLISH GORDON'S INVOLVEMENT IN THE CRIME.

To establish murder, the state was required to prove the following:

> (2) Criminal homicide constitutes murder if:
> (a) the actor intentionally or knowingly causes the death of another;
> (b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
> (c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another; . . . .

Utah Code Ann. § 76-5-203 (Supp. 2002). Also, this Court has ruled that the state must prove beyond a reasonable doubt that the defendant committed the crime. State v. Mead, 2001 UT 58, ¶65, 27 P.3d 1115.

The state may use circumstantial evidence to prove its case. However, such evidence must be of a "quality and quantity" to justify the determination of guilt. State v. Nickles, 728 P.2d 123, 127 (Utah 1986); see State v. Span, 819 P.2d 329, 332-33 (Utah 1991). This Court

will consider "whether the inferences that can be drawn from th[e] evidence have a basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt.'" State v. Brown, 948 P.2d 337, 344 (Utah 1997) (quoting State v. Workman, 852 P.2d 981, 985 (Utah 1993)).

If a verdict "'is based solely on inferences that give rise to only remote or speculative possibilities of guilt," the evidence is insufficient and the charge must be dismissed. Brown, 948 P.2d at 344; see also State v. Spainhower, 1999 UT App 280, ¶5, 988 P.2d 452 (reversal is required if the state has failed to establish an element of the offense with direct evidence or reasonable inferences); State v. Merila, 966 P.2d 270, 272 (Utah App. 1998).

The following murder cases dealt with circumstantial evidence. The convictions were upheld only where the circumstantial evidence was of such quality and quantity to support the conviction beyond a reasonable doubt.

In State v. James, 819 P.2d 781 (Utah 1991), this Court found that the circumstantial evidence was sufficient to support defendant's conviction for killing his infant son. The evidence included, *inter alia*, the following: The infant disappeared while he was in defendant's care (id. at 785), defendant made a statement that he "didn't do it on purpose" (id.), defendant was angry that the baby's mother cooperated with police in the investigation (id.), and the baby was discovered bundled in a mattress cover that defendant's landlord "had lent to defendant for [defendant's] move" to Logan. Id. at 786-87. The circumstantial evidence also supported that defendant had a motive for the crime.

> The prosecution presented evidence of past abuse of the child at the hands of defendant, evidence of defendant's jealousy of the child and the attention the child received from his mother, evidence of friction between defendant and the mother caused by the child and their different opinions of how he should be cared for, and evidence of financial problems which were caused or contributed to by the birth and presence of the child. Evidence of jealousy of a child and of past abuse is relevant in proving a defendant's pattern of conduct toward the child and the absence of accident or mistake in the incident which caused the child's death.

James, 819 P.2d at 792. The evidence in Gordon's case is inferior compared to the evidence in James. In Gordon's case, the evidence is remote and, in relevant part, speculative. It is insufficient to support that Gordon committed the crime. See infra, subpart B, below.

Next, in State v. Clayton, 646 P.2d 723 (Utah 1982), the defendant was convicted of murder, where he ransacked the victim's home and beat him. Id. at 724. The circumstantial evidence linking defendant to the crime included the following: "[A] yellow baseball cap, found at the scene of the crime, was identified as having been seen on the defendant earlier on the day of the killing; hairs from the cap were analyzed and compared with hairs from the defendant; [and] a witness testified that the defendant had left credit cards with the [victim's] name [] at her home shortly after the crime was committed." Id. The circumstantial evidence specifically placed defendant at the victim's home and later in possession of the victim's property. Such evidence does not exist in Gordon's case. Nothing was found at the crime scene or in Gordon's possession to tie him in any way to the homicide.

In State v. Petree, 659 P.2d 443 (Utah 1983), the circumstantial evidence was insufficient. Indeed, while the facts presented at trial were undisputed, the parties disagreed as to the inferences drawn from the facts. Id. at 443. According to the evidence, a Cedar

City man discovered the skeletal remains of a teenage girl, Phyllis Ady, along a fence line. Phyllis was initially reported missing on December 13, 1977, at 1:00 a.m. Id. at 444. This Court determined that "[t]he concealment of the skeletal remains and the unnatural position of the body provided sufficient evidence from which the jury could conclude that [the victim] died from criminal activity." Id. at 444.

With respect to the evidence allegedly implicating the defendant, this Court reiterated that "[t]he fabric of evidence against defendant must cover the gap between the presumption of innocence and the proof of guilt." Id. at 444-45. "[T]his does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its utmost limits, must be sufficient to prove the defendant guilty beyond a reasonable doubt." Id. at 445.

The Court identified the evidence against Defendant Petree as follows: defendant and Phyllis were the same age and attended the same school. Id. at 445. The victim's aunt, Mrs. Westman, testified that on December 11, 1977, defendant visited their home and asked for Phyllis. Id. at 444, 445. On December 12 at 6:00 p.m., Phyllis asked Mrs. Westman to drop her off at defendant's house. Id. at 445. Mrs. Westman observed the defendant walk out to meet Phyllis in the road. Id. at 445. When Phyllis did not come home later that night, Mrs. Westman went to defendant's home "but found no one there." Id. Mrs. Westman returned later and the defendant told her he did not know where Phyllis was. Id.

Additional evidence supported that on the evening of December 12, defendant called

his sister in Las Vegas and told her "he was getting a hassle at home and in school and he wanted to come down." Id. at 445. Defendant called again the next morning, and his sister drove to Cedar City. The sister took defendant to Las Vegas for four days. Id.

In addition to the fact that defendant was the last known person to see Phyllis, and the fact that he left Cedar City shortly after she disappeared, there was evidence that he made curious statements to family members and a girlfriend some time later. Id. at 445. While defendant was in Las Vegas, he told his sister that he had a nightmare about "walking with a girl and she slapped him and that's all he remembered, and then waking up taking a bath and her folks, the girl's folks pounding on the door wanting to know where she was." Id. at 445. He also told his sister later that "he thought he had hurt or killed a girl, but he wasn't sure." Id. This Court specified that defendant's last statement related to the dream, and not to an actual occurrence. Id. at 446. The defendant described the same dream to his brother and his brother-in-law. Id.

Defendant also later told a girlfriend that he "got[] into a fight with a girl in Utah," and "he had blood on his shirt; that was what was mentioned, and he couldn't remember nothing." Id. at 447 & n.4. This Court considered that evidence to be too speculative. It was insufficient to support the guilty verdict.

> The verdict of guilty of murder in the second degree rests entirely on testimony of defendant's meeting Phyllis on the street on the evening she disappeared, his trip to Las Vegas on the day following, and on three witnesses' testimony of defendant's statements to them in Las Vegas. Interpreted most favorably to the prosecution, those statements refer entirely or almost entirely to defendant's descriptions of his strange dream. The testimony that he told a date two years later that he once had a fight with

a girl in Utah adds nothing of substance on this issue.

While the evidence was sufficient for the jury to conclude that the death of Phyllis Ady involved criminal activity (the corpus delicti), the evidence was not sufficient to prove, beyond a reasonable doubt, that defendant caused Phyllis Ady's death. Even if the evidence proved that defendant caused her death, it was manifestly insufficient to prove that he did so "intentionally or knowingly," as was charged in this complaint for murder in the second degree. *U.C.A., 1953, § 76-5-203(a).*

Id. at 447. The evidence here allegedly linking Gordon to the crime is more remote than in Petree. Indeed, relevant findings on the matter are not supported by the facts and must be rejected. On that basis, the conviction for murder must be reversed, as explained below.

B. THE MARSHALED FACTS FAIL TO SUPPORT THE TRIAL COURT'S FINDINGS FOR MURDER.

In this case, the state charged Gordon with murder under three variations of the crime: depraved indifference murder, knowing or intentional murder, or knowingly causing serious bodily injury resulting in death. (R. 3-4.)

After the state presented its case, Gordon's counsel asked the judge to acquit Gordon of the crime. Counsel argued that Gordon was not the person who attacked Lundskog. (R. 210:512-522.) There were no items found at the crime scene that belonged to Gordon; the only thing left by the assailant -- the bloody shoe prints -- did not match Gordon's shoes or his size; and the only witness to observe the stomping -- Hernandez -- described facts that were inconsistent with Gordon's actions at the 7-Eleven that morning. (R. 210:512-522.)

At the close of argument, the trial court entered findings of fact and a guilty verdict. (Addendum B, hereto.) The court specifically found that Lundskog died as a result of criminal activity. (R. 211:536.) "Dr. Todd Grey has opined that, without question, he died

as a result of homicide due to craniocerebral hemorrhage. That this involved an extensive amount of blood loss and extensive blows to the head area. That there were really no other injuries to the body." (R. 211:536.) The judge also stated, "I believe the act was intentional by virtue of the manner of death. It was a homicide by beating." (R. 211:537.)

With respect to whether the evidence supported that Gordon committed the crime, the trial court found the following:

> In this case the sole issue is identification. And as with all cases, criminal and civil but particularly criminal, it's no one thing that makes the difference in a person's determination of guilt or innocence. It's a texture of threads that come together that form a conclusion.
>
> As Mr. Gotay pointed out, being at the 7-Eleven is not a crime. None of the acts or the pieces of evidence if they stood alone would probably be sufficient. It's the totality that, when they come together, paint a vivid picture. And to that end, I would point out that that is where the basis for this conviction lies.
>
> A picture, they have always said, is worth a thousand words. It is indeed. **[1]** The defendant has now admitted that he was at the 7-Eleven. There is a blowup shot that has come in as Exhibit 29 of the defendant taken from the videotape that shows him in the store, in the 7-Eleven, it looks like 5:21:03, on the date in question. **[2]** He is dressed, as described by Mr. Mellen and also by Mr. Diaz-Hernandez, in a light shirt–a light shirt that looks like blue to me and did on the video, a light blue shirt that is commensurate with the light blue T-shirt that was found among his belongings and **[3]** had the odor of having been and the look of having been freshly washed. It's now, distinctly, a new washing, and it had a detergent odor to it and it was conspicuously clean.
>
> **[4]** The person who witnessed the stomping described the person doing the stomping and kicking as a black male, later identified as the defendant.
>
> No one can get into the state of mind of another individual. Motive never needs to be proven. Intent does, and is usually determined by action, statements and factors other than the ability to get directly into one's mind. **[5]** But the motive here is perhaps the saddest thing of all, because the only motive that could have resulted from this crime is money. And we're taking about less than $45, and not taking somebody and slapping them and stealing their wallet out of their back pocket and leaving them to live their lives, but someone who is not only robbed but brutally beaten and killed.
>
> * * *

[6] There is eyewitness identification. And I am very much aware under *State v. Long* that eyewitness identification is suspect. Eyewitness identification has to be carefully considered in view of things such as the lighting, the race of the individual being identified versus the race of the person doing the identification, the time one has to see the individual, whether or not one has problems with their vision, the motions or tensions that are aroused in people when they do the observation. As I said, visual problems and lighting are key factors.

[7] Mr. Hernandez, who arrived somewhere between 5:30 and 5:40 at the 7-Eleven, had very good eyesight. He testified to the same. He is a relatively young man. This is consistent with the fact he has no eyeglasses or anything to enhance his ability to see.

[8] He immediately, upon witnessing the event that was traumatic to him–that is, the event of seeing another human being stomped and kicked–reported it to the person who drove him to work. **[9]** He believes he was driven to work about 5:35 or 5:40. In fact, the card for checking in at work shows 5:55. The events he observed, he believes, were some ten minutes or 12 minutes before that.

[10] What attracted his attention was the sounds of kicking. **[11]** This is not a friend of his, so he had no reason for his vision to be clouded by a lack of objectivity. He did not know the victim; he did not know the defendant.

[12] What he saw was another human being on the ground bleeding. At one point I know he said he thought the face of the person on the ground was black because it was covered with such dark blood. The man died near where he sat.

And this witness, Mr. Hernandez, **[see 4, above]** identified the attacker as a male, a male black standing over the victim. He said he was approximately his height or a little bigger, muscular, had short hair and was in a light-colored T-shirt and white shorts and white tennis shoes, and that the shorts were loose, baggy-type shorts that came down below the knee.

[13] Only one man in the videotape–which covers the whole time frame at issue between the time that the victim arrived at the scene, and I believe that was 4:51, and the time that the police arrived, which was approximately 6:30–only one person matches that description, both in terms of their ethnicity, or color, in terms of their size, in terms of their manner of dress. **[14] [see 2 and 3, above]** And upon search of the place where the defendant was living, shorts that are similar to precisely what was described and a T-shirt similar, both freshly washed, were found.

[See 2, above] The T-shirt is light blue, close to white. The shorts are light denim shorts. **[See 14, above]** And they are the type that are traditionally worn by young people. By "young," I mean anybody under 40–that is to say, they are baggy. And when the detective held them up, they came below his knee. I note, for the record, the detective appears to be a taller person than the defendant.

[15] Thus, the description of the shoes, the man's color, et cetera, match.

Then we have, again, the picture of the gentleman in the 7-Eleven picked up on the video.

There's the rough for the defendant. Because, yes, he could have been at the 7-Eleven like those other people in the early morning hours and no one would have ever known he was there. **[16]** But he went in and out of the 7-Eleven not one time, as he said, but three times. **[See 1, above.]** And on one of those occasions a clear shot of him was taken. And there is no doubt about who it is.

Obviously, the fact that he was in the 7-Eleven doesn't make him guilty of the homicide. **[17]** But it puts him at the scene of the crime at approximately the time when the crime occurred. When I say "approximately," we're talking within 10, 15 minutes. So we're not talking about a big expanse of time.

[18] He does have short hair, unlike the other African-American who was in the videotape. He did have on a light T-shirt, unlike the other African-American who had a long-sleeved plaid shirt.

[19] And, interestingly enough, among his personal effects, white tennis shoes were not found at the home where he was then living. The white tennis shoes would have been what, most likely, showed the signs of the homicide, being part of the attack weapon.

[See 2, 4, and 18, above] There is only one person who fit the description given by Mr. Diaz-Hernandez, who said that not only did this individual go once to the body and assault the body violently but went into the store and came out and did it again. In this courtroom, Mr. Hernandez said he was not just of the opinion it was the defendant but that he was a hundred percent certain.

[See 6, above] Again, I am aware of eyewitness identification and the problems that go along with it. This man, Mr. Hernandez, did not have a gun to his head. He was not the person suffering. He was not the person who was under the stress of the actions being directed at him. He had perfect eyesight. **[20]** The photographs make it clear that, while the lighting was not perfect, given the hour, there was lighting close by in a variety of areas. That is clear from all of the photographic evidence.

[See 6, above] He may not have recognized the defendant when shown a photo-spread where images all tend to be alike. And, quite frankly, this is a very good photo-spread in that all six images closely resemble one another, which is the aim of a photo-spread, not to taint or direct someone's identification.

[21] [see 1, above] Mr. Mellen, interestingly, had no trouble identifying the defendant from a photo-spread or in the courtroom. He identified him as the person who had been in the 7-Eleven on this occasion, on this morning. He remembered it particularly because the victim had made several unusual requests: Could he sit outside, could he sit and smoke. He also had seen the victim there on different occasions, although never that early in the morning.

And he witnessed the defendant being picked up by someone. When he arrived at the store, **[22]** Mr. Mellen, at approximately 5:20, there were no cars in the 7-Eleven parking lot. There were no cars at 5:30. But there was a black man in the store, and he describes that black man and positively identifies him as the defendant. And that man was in the store when Mr. Lundskog came in. **[23]** The other black man who's on the video footage was not in the store at the same time as the victim.

[See 2, above] The defendant was in the clothing described. Both were in the store together. **[24]** And, in fact, he saw the defendant gesture to the victim in a motion, Come with me, after the victim had opened the door for the defendant.

[25] They were not just both there at the same time; they interacted. **[26]** And they left together. **[27]** And after they left, no one saw the victim alive again. This is compelling. They passed each other.

But Mr. Mellen's testimony is more interesting even than that. And, to me, he may be the key witness in this case. He did not observe the crime but he observed events surrounding the crime that had considerable importance to me.

[28] He observed that there was a great deal of tension in the 7-Eleven. And that even he, a regular [] customer, felt uneasy and nervous. And that the defendant stared at him, what he referred to as "mad dogged" him.

This fact alone is not significant. But compiled or added to the rest of the evidence, it is extremely compelling. **[29]** What reason would this African-American male have for giving someone this kind of attention and this look unless something was amiss?

And all of the other testimony of the other people working at the store, the other people who interacted with Mr. Hernandez, who picked him up and took him to work. And Detective Judd's testimony and the physical evidence that he found, the **[see 3 and 19, above]** newly-washed clothing and the absence of the white shoes in the home where the defendant was then living.

[30] And who among us doesn't have a pair of white athletic shoes in their home? I would be surprised if there were one person here who doesn't. That, to me, is distinctive as well. **[31]** And I'm cognizant of the fact that a pair of tennis shoes turned up at another person's home sometime later that were identified as the defendant's, but that wasn't where the defendant was residing.

At 4:51 the victim entered. At 5:03 Mr. Lopez entered. **[See 1, above]** At 5:23 a black man appears, and the defendant has acknowledged that he was that black man. At 5:22 Mr. Mellen arrives. He sees the defendant and, subsequently, **[see 25, above]** he sees the defendant and the victim interact.

[See 6 and 8, above; and see findings relating to cause of death, above] Mr. Hernandez comes in and makes observations of his own and describes what must be the most horrific scene that one could imagine of one person directed at another human being–not a single action displaying indifference to one's survival but a series

of prolonged, direct, malevolent, criminal and homicidal actions toward another human being by repeated blows and stompings and kickings to the head area.

It is not just the photograph of the defendant in the store and the manner in which he treated Mr. Mellen and the fact that he engaged with the victim, it is the totality of the circumstances. And as the finder of fact, one of the things I have to consider is the appearance and demeanor of witnesses and their credibility.

[32] I found both Mr. Hernandez-who of course was reluctant initially to report this crime for obvious reasons, he's an illegal alien-and Mr. Mellen to be particularly credible witnesses. They didn't wish to be here, but they were both here and they testified in an open, credible manner. They didn't have to search for information because they were telling the truth. That is my perception from watching them.

[See findings relating to cause of death, above] Additionally, the medical examiner's testimony is extraordinarily important, not only as to manner and cause of death but as to the significant amount of pain and the number of blows that were directed at the victim.

[33] And I look at Exhibit 28, a picture of the victim smiling in his ball cap and in his overalls, holding what appears to be his ubiquitous drink of choice, a big carbonated beverage. And I can't imagine why anyone would take the life of someone like this who looks as if he would have a hard time taking care of himself, let alone offer any kind of problem to any other human being.

And, **[34]** finally, the defendant has not testified, nor do I consider that nor is it a factor in this. But I have observed throughout the trial the defendant's demeanor, which is one of a total lack of emotion, even when one listened to very painful evidence being adduced. And that, coupled with everything else, contributes to the verdict.

(R. 211:536-47 (bold numbers and information in brackets added).) Any additional findings not identified in brackets are variations on findings bracketed above.

Gordon does not challenge certain findings set forth at numbers [1], [2], [7], [8], [9], [10], [14], [21], [23], [24], and [33]. Those findings support that [1] Gordon was at the 7-Eleven between 5:21 and 5:31 on the morning in question. [2] He was wearing a light T-shirt and baggy shorts. [7], [9] Hernandez was in the area of the store between 5:35 and 5:45; he checked into work at 5:55 and it took him approximately 10 to 12 minutes to get to work.

Hernandez had "very good eyesight." [10] When Hernandez arrived in the vicinity of the 7-Eleven, he heard the sound of kicking.

[8] Hernandez witnessed a person being stomped/kicked to death. It was very traumatic for him. He reported the incident to Josefina Silva. [14] Officers seized a light colored T-shirt and shorts from a place where Gordon was living. [21] Mellen saw Gordon and Lundskog separately at the 7-Eleven store on the morning in question. [23] Another African-American, who was in the store that morning, was not inside the store at the same time as Lundskog. [24] Mellen saw Gordon wave Lundskog over to him after both Gordon and Lundskog were outside the store. And [33] Lundskog appeared to be a harmless person. There is no indication as to why anyone would take his life. (See R. 211:536-47.)

Those findings are insufficient to support the determination that Gordon committed the murder in this case. They fail to support that he had any involvement in the crime.

With respect to the remaining findings, Gordon challenges their validity on appeal. To that end, he has categorized the remaining findings in three respects: The first set of challenged findings consists of the insupportable findings. That is, the marshaled evidence fails to support them. See infra, subpart B.1. The second set of findings consists of the irrelevant findings and improper inferences. Also, in making the improper inferences, the trial court disregarded important facts presented by the state at trial. See infra, subpart B.2.

The third set of findings relates to the uncorroborated eyewitness testimony of a single person. The eyewitness testimony was tainted, and it was contrary in relevant part to

objective facts presented at trial. See infra, subpart B.3. Indeed, as set forth below, the "fabric" in this case that "cover[s] the gap between the presumption of innocence and the proof of guilt" is flimsy. Petree, 659 P.2d at 444-45. The trial court took speculative leaps across the gaps in evidence to render a guilty verdict. That was improper.

1. The Marshaled Evidence Does Not Support the First Set of Findings.

The following findings are erroneous: [5], [20], [22], [25], [26] and [27]. The marshaled evidence fails to support them.

Finding [5] is as follows:

> But the motive here is perhaps the saddest thing of all, because the only motive that could have resulted from this crime is money. And we're taking about less than $45, and not taking somebody and slapping them and stealing their wallet out of their back pocket and leaving them to live their lives, but someone who is not only robbed but brutally beaten and killed.

(R. 211:538-39.) According to the marshaled evidence, Green Gables employees testified that on Friday, September 28, they gave Lundskog $45. That was his allowance ($15/day) for Friday, Saturday and Sunday. (R. 208:30, 33; 208:54.) The manager of Green Gables did not find any money in Lundskog's room after his death. (R. 208:55.) Also, officers did not find any money in Lundskog's wallet at the scene of the crime. (R. 209:333.)

Although the Green Gables manager did not have personal knowledge of the matter here, he testified that he believed Lundskog did not spend all of the $45. He stated that Lundskog would have "spread [the money] over the weekend. Because if he didn't have any [money], he wouldn't have a good weekend[.]" (R. 208:33.)

The marshaled evidence does not support a robbery. Rather, it supports that Lundskog did not have money in his wallet when he died.

The court's finding regarding robbery as a motive for the offense is a huge leap. Officers found a dollar bill and change in Lundskog's front pocket that was undisturbed. (R. 210:467.) Also, the officers who investigated the scene testified that there was no sign of blood on the wallet and no indication of a disturbance regarding the wallet. (R. 209:332-33.) Thus, there was no evidence to suggest that the attacker intended to rob Lundskog.

Also, while Green Gables employees believed Lundskog would have had money for the weekend, they also testified that he was a compulsive buyer. He made several purchases each day and had a habit of giving his money to others. (R. 208:33; see also 208:57-58.) The manager at Green Gables had no way to know how many stores Lundskog visited before his death, how many purchases he made, whether he gave money to residents (R. 208:58), or whether Lundskog left money at Green Gables that was taken by another resident.

In short, there was no evidence to suggest that Lundskog was beaten for less than $45. There was no sign of tampering and no indication that the attacker was interested in the wallet. (See R. 209:332-33.) The court's finding at [5] was not based in the evidence.

Next, finding [20] concerned the lighting. The judge found that while the lighting "was not perfect," there was lighting in the area to assist Hernandez in making his observations. The court stated, "That is clear from all of the photographic evidence." (R. 211:543.) The finding regarding lighting is insupportable. No state witness was able to testify that the

dumpster area had any lighting to speak of. Indeed, the store manager testified that the lighting was "pretty good" if "you're closer" to the dumpster, 3 or 4 feet away. Further from the dumpster, the lighting was poor. (R. 208:43-44.) Hernandez was 75, 142 and 282 feet away when he made observations. (R. 210:396-97; 209:374.)

Also, Hernandez testified that there were no lights in the area where the crime occurred. He explained at trial that "now" the store has lighting on the north side of the area. (R. 208:62.) He also testified that the conditions were darker on the morning of the murder than depicted in the photos. (R. 208:111.)

Witness Steven Butcher testified with respect to the lighting. He stated that he walked right up to someone behind the dumpster on the morning of September 29, and even up close, he could not see Lundskog or make out what he looked like. (R. 209:283.) Butcher testified that even in daylight, it would be difficult from the road to the north to see activity behind the dumpster. (R. 209:283.) Also, the witness, who took the photographs, testified that he had no knowledge of the lighting situation on September 29. (See R. 209:369-72 (photos taken at night in November); 210:398.) The trial court's finding that there was lighting is not supported by the evidence; it must be rejected.

At finding [22], the trial court determined there were no cars at the 7-Eleven at 5:30 a.m. That finding apparently was based on Hernandez's testimony. He indicated no activity at the 7-Eleven when he witnessed the incident. Indeed, the only person Hernandez observed at the 7-Eleven was the attacker, and the only other activity he described at the store was a four-door Nissan/Chevrolet that pulled into the 7-Eleven parking lot for the

attacker. (R. 208:80-81, 83, 85.) According to Hernandez, after the driver of the Nissan/Chevrolet pulled into the lot, he turned off the headlights to the car. (R. 208:82.) Also, Hernandez testified that he arrived in the area at 5:35. (R. 208: 76-77.)

Compelling evidence reflected activity at the store between 5:25 and 5:30. Specifically, Gordon arrived at the store at 5:20:45. (R. 210:426-28.) At 5:27 Lundskog crossed the video screen from north to south. (Id. at 436.) At 5:31:18 Gordon entered the store and picked up the phone. (Id. at 439.) At 5:32, the video showed the lights from a car pulling into the parking lot. Gordon then left the store empty-handed. (Id. at 440-41, 466.)

Significantly, just before Gordon entered the store for the final time, at approximately 5:29:30, a car pulled up and an unidentified "male Caucasian" entered the store. (R. 210:437-38.) At 5:30:01, Velasquez entered the store followed by his coworker. (R. 210:438; 209:231.) Velasquez testified that he drove his car to the store. (R. 209:229-30.) Thus, overwhelming evidence supports activity at the 7-Eleven between 5:27 and 5:31 (see R. 210:469; 209:230-31), including cars in the parking lot and/or at the gas pumps. Also, a man pulled into the parking lot and entered the store before Gordon left for the final time. (R. 210:482-84.) The trial court's finding to the contrary must be rejected.

Finally, findings [25] through [27] are as follows: Gordon and Lundskog interacted, they left "together," and "after they left, no one saw the victim alive again." (R. 211:544.) The only evidence of interaction between Gordon and Lundskog is that Gordon passed by Lundskog at the door of the 7-Eleven. (R. 210:431.) Mellen also observed Gordon as he

waved to Lundskog. (R. 209:241-42.) The marshaled facts do not support that Gordon and Lundskog "interacted." Indeed, Mellen specifically testified that he did not see Lundskog walk over to Gordon and he did not see them make contact. (R. 209:258.) There is no evidence that Gordon and Lundskog "left together." And contrary to the court's finding, Butcher's testimony supports that he encountered Lundskog at 5:45 behind the dumpster. According to Butcher's testimony, Lundskog was alive. (R. 209:270-71.) Thus, Butcher was the last reported person to see Lundskog alive at 5:45. The trial court's findings at [25] to [27] are inaccurate and should be disregarded.

2. Additional Findings Make Improper Inferences and Are Irrelevant. This Court Should Reject Those Findings as Speculative and Remote.

Gordon maintains that Findings [3], [16], [19], [28], [29], [30], [31], and [34] make improper inferences or they are irrelevant to the analysis. In addition, the circumstantial evidence purportedly supporting those findings is of such deficient quality and quantity that this Court should be left with the definite and firm conviction that a mistake has been made where those findings are concerned.

Specifically, finding [3] relates to the clothing belonging to Gordon that officers seized a few days after the homicide. The trial court found the following: "It's now, distinctly, a new washing, and it had a detergent odor to it and it was conspicuously clean." (R. 211:538.) That finding is improper.

The relevant evidence concerning the clothes supported the following. Colleen Hough, a serologist for the Utah State Crime Lab, testified that she analyzed a shirt, khaki

shorts, and two T-shirts belonging to Gordon for the presence of blood. (R. 209:353-54.) Hough looked for stains. She did not find any. Hough testified that "if anything looked like it could possibly be a stain, then it was analyzed with Kastle-Meyer." (R. 209:355, 358.) Also, Hough testified that she did not note whether the clothes appeared to be freshly laundered. (R. 209:355.) Thus, the pertinent finding was that the expert did not find blood on the clothes. Based on the evidence, it is unclear why the trial court made a finding regarding a "new washing." Such an inference was improper and irrelevant.

Next, finding [16] provides that Gordon "went in and out of the 7-Eleven not one time, as he said, but three times." (R. 211:542.) The marshaled evidence reflects the following. Officer Prior interviewed Gordon on October 3, 2001, at 4:27 a.m. Gordon could not recall specifically how many times he entered the 7-Eleven store on September 29. Gordon stated "[t]hat he was pretty sure it was only one time." (R. 210:452.) Indeed, according to the interview transcript, when the officer asked, "How many times did you enter the store?" Gordon answered, "Just . . . I think one time." (State's Exhibit 57 at 22.) Gordon also told officers he called Quintana more than once, but he was "pretty sure" he went into the store one time. (Id. at 25.)

The trial court's finding at [16] suggests that Gordon misrepresented the matter, while the transcript reflects that during an early morning interview, Gordon could not specifically recall how many times he entered the store. The court's finding is exaggerated and makes an unfair inference. It should be disregarded.

Finding [19] is as follows: "[A]mong [Gordon's] personal effects, white tennis shoes

were not found at the [Morton Drive] home where he was then living. The white tennis shoes would have been what, most likely, showed the signs of the homicide, being part of the attack weapon." (R. 211:542.) That finding is improper. See also Finding [31]. The only evidence presented at trial regarding Gordon's "home" was that he had been living with Quintana at her grandmother's apartment for "a little more than a week." (R. 210:451; see also R. 1.) He was not a permanent resident of Morton Drive. (Id.)

While Gordon kept items at the Morton Drive residence, he also kept white Reeboks at another friend's home. (R. 210:500.) An officer examined those shoes; he did not find blood on them. (R. 210:500.) The officer compared Gordon's Reeboks to the bloody shoe prints at the crime scene. The officer concluded that Gordon's prints did not match those at the scene. (Id.) The trial court's findings at [19], and the finding at [31] regarding Gordon's residence, are improper and must be rejected.

With respect to finding [28], it states that Mellen observed tension in the 7-Eleven. He was a regular customer, and on the morning in question, he felt "uneasy and nervous" at seeing Gordon in the store. (R. 211:545.) Mellen testified that something was strange that morning; there were no cars in the parking lot. (R. 209:239-41, 252-53.) The fact that Mellen felt uneasy because no cars were there seems irrelevant. Mellen also testified that after he left the store, Gordon came out and looked at him "pretty hard." (R. 209:241, 262.) The trial court made a finding to that effect in reaching the verdict in this case. (R. 211:545.) That finding is irrelevant; the limited interaction between Mellen and Gordon does not lend

support to any element of the crime and it does not make it more probable that Gordon committed the homicide.

Indeed, in this case, Mellen's testimony was material on one point: he saw Gordon wave to Lundskog. (R. 209:258.) Mellen's personal feelings add nothing to the case. Unless Mellen is able to detect crime before it happens, or is able to identify objective facts to support criminal conduct, his personal biases and prejudices should not be considered.

The same argument applies to finding [29]. The trial court stated, "What reason would this African-American male have for giving someone this kind of attention and this look unless something was amiss?" (R. 211:545.) The logical answer is that Gordon likely sensed Mellen's negative reaction to him, causing Gordon instantly to dislike Mellen. Gordon's reason for "mad dogging" Mellen was personal to Mellen. It had nothing to do with Lundskog. It is not relevant to the matter and should be rejected.

Next, finding [30] is an editorial comment. It is not based in any evidence of record: "And who among us doesn't have a pair of white athletic shoes in their home? I would be surprised if there were one person here who doesn't. That, to me, is distinctive as well." (R. 211:545.) The editorial finding should be rejected.

With respect to finding [34], the court stated while it would not consider the fact that Gordon did not testify, the court had "observed throughout the trial the defendant's demeanor, which is one of a total lack of emotion, even when one listened to very painful

evidence being adduced. And that, coupled with everything else, contributes to the verdict." (R. 211:547.) That finding is irrelevant and improper.

In Reed v. State, 197 So.2d 811 (Miss. 1967), defendant appealed a conviction for manslaughter, in part, based on the prosecutor's argument that the jury should consider that defendant "sat and showed no emotion whatever during the trial of this case." Id. at 814. In considering the matter, the Mississippi Supreme Court ruled that it is particularly improper to have the fact finder consider whether the accused "has a bad or guilty look." Id. at 815 (cite omitted). In Reed, the court ruled that "[t]he argument of the prosecuting attorney in the instant case called the jury's attention to the fact that the defendant sat in the courtroom and showed no emotion, and the implication was clear that, for that reason, he must be guilty." Id. Such a consideration constituted error. The court reversed the case and remanded it for a new trial.

In Gordon's case, the trial court specifically considered Gordon's look at trial to determine guilt. The court made reference to his failure to testify and lack of emotion. Those considerations are improper. They do not relate to any element of the crime, and they do not support that Gordon was involved. It was improper and fundamentally unfair for the court to consider Gordon's trial "look" to support the verdict. See U.S. Const. amend. XIV (ensuring due process and fundamental fairness); amend. V (a defendant cannot be compelled to testify). Where Gordon exercised his right not to testify in this case, the trial court cannot hold that against him as part of the conviction. Finding [34] should be rejected.

In short, the totality of the evidence identified above reflects that the state's expert did not detect blood on Gordon's clothes; Gordon was mistaken about his belief that he entered the 7-Eleven store just once on September 29; Gordon kept a pair of white Reebok shoes at a friend's house, not at the house where he had been staying for the past week; Mellen felt nervous and uneasy when he was inside the 7-Eleven with an African-American male; Gordon mad-dogged Mellen as he left the parking lot; the trial court believed everyone had a pair of white athletic shoes at home; and Gordon did not testify or show emotion at trial. Those findings do not lend support to any element of the crime. They do not link Gordon to Lundskog or to the offense. The findings are irrelevant, they consist of improper inferences, and they should be disregarded.

3. The Remaining Findings Relate to the Eyewitness Identification. As this Court Is Aware, Such Evidence Should Be Treated with Caution. Here, Certain Facts Identified by the Eyewitness Are Inconsistent with the Video. Also, the Eyewitness Was Influenced by an Unrelated Third Party in His Testimony. The Eyewitness Testimony Here Is Insufficient to Support the Conviction.

The remaining findings, [2] in part, [4], [6], [11], [12], [13], [15], [17], [18], and [32], relate to Hernandez's "eyewitness" testimony of the incident. The findings in sum include the following: The trial court was aware that eyewitness identification required consideration of several factors, including the race of the person identified versus the race of the identifying party, timing, problems with vision, and emotional tensions; Hernandez witnessed the stomping; he described the attacker and identified him to be Gordon; Hernandez did not know the attacker or the victim; his eyewitness identification was not "clouded by a lack of

objectivity"; he saw the victim "on the ground bleeding," and he saw the face of the victim; Hernandez's physical description of the attacker matched the description of Gordon in the 7-Eleven video; Gordon was at the store early that morning; and the court found Hernandez and Mellen to be credible witnesses. (R. 211:536-47.)

Gordon is challenging the findings relating to eyewitness identification on the basis that the court misapplied the law on the matter, and the evidence here was unreliable.

Although Hernandez truly believed in the testimony that he provided, compelling evidence supports that Gordon could not have been the attacker, and/or Hernandez did not observe the incident as he described it. Stated another way, "although there is evidence to support" the findings, Walker, 743 P.2d at 193 (citing U.S. Gypsum Co., 333 U.S. at 395), that is not enough. The evidence in this case should leave the Court with a "definite and firm conviction that a mistake has been committed" with the findings and under the law. Id. That is the basis for Gordon's challenge to the findings concerning eyewitness identification.

To explain, in State v. Long, 721 P.2d 483 (Utah 1986), this Court questioned the wisdom of allowing the uncorroborated identification testimony of a single eyewitness to serve as the linchpin of the prosecutor's case. This Court recognized the following:

> The literature is replete with empirical studies documenting the unreliability of eyewitness identification. *See generally* P. Wall, *Eyewitness Identification in Criminal Cases* (1965); E. Loftus, *Eyewitness Testimony* (1979). There is no significant division of opinion on the issue. The studies all lead inexorably to the conclusion that human perception is inexact and that human memory is both limited and fallible.

Long, 721 P.2d at 488; see also State v. Jonas, 725 P.2d 1378 (Utah 1986). Also,

> Anyone who stops to consider the matter [of eyewitness identification] will recognize that the process of perceiving events and remembering them is not as simple or as certain as turning on a camera and recording everything the camera sees on tape or film for later replay. What we perceive and remember is the result of a much more complex process, one that does not occur without involving the whole person, and one that is profoundly affected by who we are and what we bring to the event of perception. *See* R. Buckhout, *Eyewitness Testimony, 15 Jurimetrics J. 171, 179 (1975)* (reprinted from 231 Scientific American 23 (Dec. 1974)).
>
> Research on human memory has consistently shown that failures may occur and inaccuracies creep in at any stage of what is broadly referred to as the "memory process." This process includes the acquisition of information, its storage, and its retrieval and communication to others. These stages have all been extensively studied in recent years, and a wide variety of factors influencing each stage have been identified. *See* Loftus, *supra,* at chs. 3-5; Buckhout, *supra,* at 172-81.

Long, 721 P.2d at 488. This Court identified factors for consideration in assessing eyewitness identification testimony. "[T]he circumstances of the observation are critical," including the distance from which the event is observed, the lighting, the amount of movement involved, and the length of time available to the witness to perceive the events. Id. at 488.

In this case, the factors identified in Long undermine the accuracy of Hernandez's observations. Hernandez testified that he made observations from 75, 142 and 282 feet away. (R. 210:396-97; 209:303, 374.) Those distances would make it difficult to see anything. (See R. 209:283 (Butcher's testimony).) Also, the facts support inadequate lighting in the area on the morning in question. (See supra, pages 31-32 regarding finding [20]). According to Butcher, when he was in the area around 5:45 a.m., he walked right up to a person on the ground behind the dumpster. He did not see anything of relevance. (R. 209:283-84.)

With respect to the amount of movement involved, Hernandez described the actions of the attacker and he described a four-door Nissan/Chevrolet that pulled into the parking

lot. Hernandez testified that during the incident, he did not observe any other activity at the 7-Eleven. While Hernandez described those actions, another eyewitness -- *i.e.* the 7-Eleven video -- recorded Gordon's actions. The discrepancies between the two are relevant, calling Hernandez's account into question.

Specifically, Hernandez testified that he reached the 7-Eleven at approximately 5:35 in the morning. (R. 208:76-77.) As soon as he arrived, Hernandez "heard some noises." (Id. at 64.) He ignored the matter and continued on his way until he was 75 feet from the dumpster area. (R. 208:65; 210:396.) He then turned and looked. Hernandez saw the assailant stomping on the victim. (R. 208:67.) He "didn't pay very much attention" and he was there "for very little time." (R. 208:68.) Hernandez provided a description of the attacker. He then continued to walk and he did not watch the attack. (R. 208:70-73.)

When Hernandez was 142 feet from the dumpster area, he turned and again watched the attack. (R. 208:73-74.) He then crossed Redwood Road. He was 282 feet from the dumpster area. (R. 208:74-76; 209:374.) He estimated that once he arrived in the 7-Eleven area, it took him approximately 5 minutes to get across the road. (R. 208:128.)

After Hernandez crossed Redwood Road, he saw the assailant walk toward the 7-Eleven. (R. 208:78.) Hernandez observed the attacker go into the store and then he came out with two bags that were each 2½ feet high and 18 inches wide. (R. 208:83-84.) Hernandez also saw blood on the attacker's shoe (R. 208:80), and he observed a four-door Nissan/Chevrolet pull into the parking lot. (R. 208:83, 85.) The driver turned off the head-

lights (R. 208:82), and waited while the attacker placed the bags in the back seat of the car. (R. 208:85.) The attacker then walked over to the victim and kicked him again. (R. 208:85.) Hernandez did not observe any other activity at the store. (R. 208:85.)

The primary eyewitness to Gordon's actions was the surveillance camera. The information contained in the 7-Eleven video supports either that Gordon was not the attacker and/or that Hernandez was incorrect about his observations, placing his testimony in doubt. For example, Gordon was at the store from 5:20:45 to 5:31. He left the area before 5:35. Hernandez's clock would have to be 8 to 10 minutes fast in order for the timing to coincide. Yet, Hernandez was clear that he arrived in the area at 5:35, he then walked toward Redwood Road, crossed the street, and waited 7 or 8 minutes for Josefina Silva to pick him up (R. 208:77). It took him 10 to 12 minutes to get to work. (R. 208:92.) Hernandez punched in at 5:55. (R. 208:92, 130.) The timing of events as described by Hernandez suggests the crime occurred after 5:35 when Gordon was no longer there.

With respect to additional activity at the 7-Eleven, the surveillance camera showed Lundskog at the store at 5:27:21. (R. 210:436; 209:261.) Two minutes later, at 5:29, a car pulled into the store parking lot. Thereafter, an unidentified man walked into the store. A minute and a half later, at 5:30:01, another car pulled into the gas pumps and two men entered the store, Velasquez and a co-worker. (R. 210:437-38.) None of the men reported hearing or seeing anything unusual at the store that morning. Yet, if Gordon had been involved in the assault, those men would have been closer to the activity than Hernandez.

Also, while Hernandez testified that he did not observe any other activity at the store, the 7-Eleven video reflected activity the entire time Gordon was there.

At 5:31:18, Gordon entered the store and picked up the phone. (R. 210:439.) At 5:31 car lights were reflected in the video and a man identified as John Middleton walked in. (R. 210:482-83.) Another car then pulled into the parking lot. (R. 210:440-41.) Gordon left the store empty-handed. (Id.; R. 210:466.)

This Court has recognized that an eyewitness is not "as certain as turning on a camera and recording everything the camera sees on tape or film for later play." Long, 721 P.2d at 488. In this case, the eyewitness to Gordon's conduct was a video camera. It provided more certainty than Hernandez's testimony. Indeed, when considering Hernandez's testimony regarding the account, he was equivocal.

He stated that he initially ignored the incident (R. 208:65); he "didn't pay very much attention" (R. 208:68); the attacker turned only once when Hernandez was walking (R. 208:117); he saw the attacker's face maybe around 3 or 4 seconds (R. 208:118); when he saw the attacker turn around, he avoided the attacker by looking away (R. 208:74-75); he did not continue to watch the attack as he walked (R. 208:73); it was dark when he made his observations (R. 208:111); he could not say whether the suspect had facial hair or jewelry because it was too dark, "nothing could be seen" (R. 208:127); he was "traumatized" (R. 208:129); and he stated, "When it comes to sad cases, I want you to know that I don't like to remember them that well." (R. 208:146.)

As this Court has recognized, "the human brain cannot receive and store all the stimuli simultaneously presented to it." Long, 721 P.2d at 489. Thus, people are selective in their perceptions. Over time, while they remember some facts correctly, they compensate for their inability to recall all aspects of the event. "[I]n the retention stage people tend to add extraneous details and to fill in memory gaps over time, thereby unconsciously constructing more detailed, logical, and coherent recollections of their actual experiences." Id. at 490.

In this case, it is unclear which extraneous details were added to fill in memory gaps. Indeed, Hernandez could have subconsciously filled in information later that implicated Gordon. By way of explanation, Hernandez admitted at trial that in earlier interviews and proceedings in this case, he could not identify Gordon as the attacker. (R. 208:104, 107-08.) Yet at trial he was confident Gordon committed the crime. (R. 208:101-02.) Hernandez filled in that detail to compensate for a memory gap.

Also, Hernandez testified that he did not report the incident to police. Rather, he reported the matter to Jose Lopez. (R. 208:137.) Lopez then contacted police on Sunday. He told police that the suspect wore "long pants." (R. 208:165.) Police showed the video tape to Lopez (R. 208:168), Lopez identified Gordon as the suspect (R. 208:168); then Lopez went home and discussed the video tape with Hernandez before Hernandez went to police. (R. 208:138; 208:170 (Lopez discussed Gordon to Hernandez).) The evidence supports that Lopez's discussions allowed Hernandez to fill in memory gaps with information specifically implicating Gordon. That makes Hernandez's eyewitness account questionable/doubtful.

In the end, the reliable eyewitness evidence consists of the video tape. It is in conflict with Hernandez's testimony. The evidence is in conflict with respect to timing (the video recorded Gordon's presence at the store between 5:27 and 5:32, while Hernandez made observations between 5:35 and 5:45); activity at the 7-Eleven (Hernandez reported no other activity at the 7-Eleven when he made his observations, while the video reflected activity at the time Gordon was there; also Hernandez claimed that the suspect carried bags out of the store while Gordon left the store without bags); and other witness observations (4 patrons between 5:27 and 5:32 were unaware of suspicious sounds/activities, while Hernandez made eyewitness observations from 282 feet in the dark).

The discrepancies in total should leave this Court with a firm conviction that a mistake has been made with respect to the findings/verdict. The evidence leaves serious doubt as to whether Gordon was in the vicinity at the time of the incident, and whether he had the time or tenacity to commit the crime while patrons were coming and going from the store. This Court should reject the findings relating to Hernandez's eyewitness testimony.

In this case, "[t]here was no other evidence of admissions, no physical evidence, and no motive for the homicide." Petree, 659 P.2d at 445. The findings and verdict should be vacated, where the evidence was insufficient.

C. IN THE EVENT THIS COURT DETERMINES THAT THE SUFFICIENCY ISSUE WAS NOT PRESERVED, IT MAY REACH THE MERITS OF THE MATTER UNDER THE PLAIN-ERROR ANALYSIS OR THE EXTRA-ORDINARY-CIRCUMSTANCES DOCTRINE.

1. Plain Error. This Court may apply the plain-error analysis to reach the sufficiency

issue raised here. This Court has stated the following with regard to the analysis:

> The plain error exception enables the appellate court to "balance the need for procedural regularity with the demands of fairness." State v. Verde, 770 P.2d 116, 122 n.12 (Utah 1989). "At bottom, the plain error rule's purpose is to permit us to avoid injustice." [State v. Eldredge, 773 P.2d 29, 35 n.8 (Utah 1989).] To demonstrate plain error, a defendant must establish that "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." Dunn, 850 P.2d at 1208-09.

Holgate, 2000 UT 74, ¶13; see State v. Bullock, 791 P.2d 155, 164 (Utah 1989) ("neither a counsel's nor a judge's error should be the cause of one's going to prison"), cert. denied, 497 U.S. 1024 (1990).

The first prong of the analysis is met based on a review of the record in this case. According to the record, an error exists. The trial court made findings of fact that are not supported by the evidence. See supra, subpart B.1, above. The court made irrelevant findings and improper inferences, and the findings relating to Hernandez's observations conflict with other compelling, objective evidence. See supra, subpart B. 2. and 3., above. It is well-settled that if the evidence is insufficient, the verdict cannot be sustained. See Utah Code Ann. § 77-17-3 (1999). Based on the record in this case this Court should find that the findings are insupportable in relevant part, and must be rejected. Error exists.

With respect to the second prong, the error should have been obvious to the trial court. The trial court was the fact-finder here. It had the duty under the law to examine evidence in light of the proper legal standards and to discharge the defendant if the evidence was insufficient. See Utah Code Ann. § 77-17-3. The trial court was required to make

proper findings based in the evidence. See Walker, 743 P.2d at 193 (findings that are "against the clear weight of the evidence" or insupportable will be set aside).

Also, the trial court was required to assess eyewitness identification testimony with caution. This Court's ruling in Long, 721 P.2d at 488-91 is well established. Indeed, the trial court here referenced its obligations under Long, but failed to properly apply the law. In the context of this case, where Gordon has established insufficient evidence (see supra, subpart B, herein), and the trial court was the fact finder, the evidentiary defects should have been obvious to the court. The erroneous findings may be reviewed for plain error.

With respect to the third prong, where the findings are based in insufficient evidence and are erroneous, the verdict is not sustainable. In that instance, this Court must vacate the conviction and remand the case for a dismissal. Petree, 659 P.2d at 447; State v. Gonzales, 2000 UT App 136, ¶21, 2 P.3d 954 (reversed); Merila, 966 P.2d at 272-73. In the event the Court in this case considers the evidence to be insufficient, the prejudice to Gordon is self-evident: he has been unjustly convicted of a first degree felony offense and incarcerated for life based on insufficient evidence to support that conviction. To ensure that the verdict is not unlawful, this Court should review Gordon's claim of insufficient evidence.

This Court may reach the merits of Gordon's claim under the plain-error analysis.

2. Extraordinary Circumstances. In Holgate, this Court stated, "'[T]he exceptional circumstances exception is ill-defined and applies primarily to rare procedural anomalies.'" Holgate, 2000 UT 74, ¶12 (cite omitted). While this Court did not elaborate on what constitutes a "procedural anomal[y]," it made reference to Rule 52(b) (Holgate, 2000 UT 74,

¶14 n.4), which permits a party to a bench trial to raise the sufficiency issue for the first time on appeal. See Utah R. Civ. P. 52(b) (2002). This Court should find that a criminal bench trial constitutes "extraordinary circumstances."

Indeed, this Court has already ruled that Rule 52(a) applies in criminal cases tried to the bench. See Walker, 743 P.2d at 192-93 (applying Rule 52(a) to criminal proceedings). Rule 52(b) likewise should apply in that context. In State v. Goodman, 763 P.2d 786 (Utah 1988), this Court stated, "Rule 52 applies to criminal actions under Utah Code Ann. § 77-35-26(7) (Supp. 1988) and Utah Rule of Civil Procedure 81(e)." Id. at 787 n.2; see also State v. Larsen, 2000 UT App 106, ¶9 n.4, 999 P.2d 1252; Utah Code Ann. § 77-17-3 (1999) ("When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged"); Utah R. Civ. P. 81(e); supra note 1, herein.

Any other result is unreasonable. It seems superfluous to require both a ruling on a motion to dismiss and a separate ruling/verdict on the evidence in a bench trial to properly preserve the issue for this Court. (See supra, pages 2-4, herein ("Preservation of Sufficiency Issue").) An argument to acquit followed by findings and a verdict should be enough to preserve the issue for purposes of appeal. Utah R. Civ. P. 52(b). That process gives the trial court adequate opportunity to consider the sufficiency of the evidence before it. The purpose of the preservation rule is properly served in that instance. On that basis, Gordon respectfully urges this Court to reach the merits of the issue on review, and to reverse the conviction where the evidence here was insufficient to support the verdict.

CONCLUSION

For the reasons set forth herein, Gordon respectfully requests that this Court reverse the judgment and vacate the guilty verdict on the basis that the evidence is insufficient to support the determination that Gordon committed the homicide in this case.

SUBMITTED this 13th day of December, 2002.

LINDA M. JONES
MICHAEL A. PETERSON
Attorneys for Defendant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered 10 copies of the foregoing to the Utah Supreme Court, 450 South State Street, Fifth Floor, Salt Lake City, Utah 84111, and 4 copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 13th day of December, 2002.

LINDA M. JONES

DELIVERED to the Supreme Court and the Attorney General's office as set forth above, this ___ day of _____, 2002.

_____

ADDENDA

ADDENDUM A

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PROCESSING DIVISION
COURT LIAISON

THE STATE OF UTAH

Plaintiff,

vs.

Adrian Whitfield Gordon

DOB 1-8-81

SO# 233183

Defendant.

JUDGMENT, SENTENCE (COMMITMENT)

02 APR -5 12 28

Case No. 011915498

Count No. 1

Honorable Lew. S

Clerk MGS

Reporter K Schultz

Bailiff C Keogh

Date 4/5/02

☐ The motion of _____ to enter a judgement of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury, ☒ the court, ☐ plea of guilty; ☐ plea of no contest; of the offense of Murder, a felony of the 1 degree, ☐ a class ____ misdemeanor, being now present in court and ready for sentence and represented by Gretay, and the State being represented by Bates is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☐ to a indeterminate term not to exceed one year. ☐ at defendant's election.
- ☒ to a maximum mandatory term of 5 years and which may be life;
- ☐ not to exceed five years;
- ☐ of not less than one year nor more than fifteen years;
- ☐ of not less than five years and which may be for life;
- ☐ not to exceed _____ years;
- ☐ and ordered to pay a fine in the amount of $_____;
- ☐ and ordered to pay restitution in the amount of $_____ to _____
- ☐ such sentence is to run concurrently with _____
- ☒ such sentence is to run consecutively with other cases specifically robbery
- ☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Court(s) _____ are hereby dismissed.
- ☒ Credit time served specific to this case
- ☐ Defendant is granted a stay of above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.
- ☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this judgment and commitment.
- ☒ Commitment shall issue Forthwith

DATED this 5 day of April, 19 2002

APPROVED AS TO FORM:

_____
Defense Counsel

_____
Deputy County Attorney

_____
DISTRICT COURT JUDGE

(White-Court) (Green-Judge) (Yellow-Jail/Prison/AP&P) (Pink-Defense) (Goldenrod-State)

ADDENDUM B

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. ADRIEN WHITFIELD GORDON, Defendant.	Case No. 011915498 Transcript of: FOURTH TRIAL DAY (Judge's Verdict) (Volume IV)

BEFORE THE HONORABLE LESLIE A. LEWIS

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

DECEMBER 20, 2001

REPORTED BY: SUZANNE WARNICK, RDR, CSR
238-7529

respect in that both the defense and the State were extraordinarily well prepared and zealous in their presentation of the evidence and highly professional.

It is clear that, unlike many cases where there are a number of issues, in this case there is a single issue. There is no issue about who died, Mr. Lundskog. There is no issue about how he died. Dr. Todd Grey has opined that, without question, he died as a result of homicide due to craniocerebral hemorrhage. That this involved an extensive amount of blood loss and extensive blows to the head area. That there were really no other injuries to the body.

There is no question that this occurred at or by the 7-Eleven on Redwood Road in Salt Lake County. And there is no question but that whoever did this, due to the means of the homicide -- this is not an act where someone shoots a gun not knowing whether they are going to hit someone -- but it was literally inches or less than inches away from another human being's face and head and brain, and, according to the one witness, kicked and/or stomped this person's head somewhere between eight and 18 times.

There is no one, including children, who don't understand the effects of trauma to the head. And in this case where blood was rapidly flowing and very visible, it became immediately clear what the person's intent was. And the act was intentional or knowing or certainly a matter of

depraved indifference. And it's not up to me to make that determination today, except to say that it falls within the statutory language. I believe the act was intentional by virtue of the manner of death. It was a homicide by beating.

And there is, further, no question as to the date this occurred. This occurred on September 29th of this year in the early morning hours. Mr. Lundskog was at the wrong place at the wrong time. Ironically, this was because it was a Saturday morning and he received his allowance on Fridays for the weekend sometime around 10 o'clock. Hence, the fact, as one observer pointed out --I think it was Mr. Mellen -- he had never seen him in the store that early. That's because he didn't get his allowance that early. But on this particular day he was operating on money he had received the day before.

In this case the sole issue is identification. And as with all cases, criminal and civil but particularly criminal, it's no one thing that makes the difference in a person's determination of guilt or innocence. It's a texture of threads that come together that form a conclusion.

As Mr. Gotay pointed out, being at the 7-Eleven is not a crime. None of the acts or the pieces of evidence if they stood alone would probably be sufficient. It's the totality that, when they come together, paint a vivid picture. And to that end, I would point out that that is where the basis for this conviction lies.

A picture, they have always said, is worth a thousand words. It is indeed. The defendant has now admitted that he was at the 7-Eleven. There is a blowup shot that has come in as Exhibit 29 of the defendant taken from the videotape that shows him in the store, in the 7-Eleven, it looks like 5:21:03, on the date in question. He is dressed, as described by Mr. Mellen and also by Mr. Diaz-Hernandez, in a light shirt -- a light shirt that looks like blue to me and did on the video, a light blue shirt that is commensurate with the light blue T-shirt that was found among his belongings and had the odor of having been and the look of having been freshly washed. It's now, distinctly, a new washing, and it had a detergent odor to it and it was conspicuously clean.

The person who witnessed the stomping described the person doing the stomping and kicking as a black male, later identified as the defendant.

No one can get into the state of mind of another individual. Motive never needs to be proven. Intent does, and is usually determined by action, statements and factors other than the ability to get directly into one's mind. But the motive here is perhaps the saddest thing of all, because the only motive that could have resulted from this crime is money. And we're talking about less than $45, and not taking somebody and slapping them and stealing their wallet out of their back pocket and leaving them to live their lives, but

someone who is not only robbed but brutally beaten and killed.

What we know is that the victim got up early that morning, which was unusual, because he had gotten his allowance the day before, although he was an early riser. He was disabled mentally and lived at a care facility nearby. We heard from the care providers about the allowance, about the fact that he would be an easy target, a perfect victim. We heard about his pattern of going each day to various places where he sat by himself and spent small amounts of money.

In this case, as on the other days, the testimony was that he sat outside alone, didn't interact with anyone, had no particular friends, no enemies. And he left no money with him. He died near where he sat, near the 7-Eleven where he smoked his cigarettes and drank his Big Gulps.

The case was screened and filed on October 3rd or 4th, two days after the Hernandez interview. And as the State pointed out, this interview is key to the case. I would not say it is the brick that holds the case together. I would say it is one of many, many, many bricks. As I say, this is a case built upon many bricks and many circumstances, and the totality creates the final outcome.

There is eyewitness identification. And I am very much aware under *State v. Long* that eyewitness identification is suspect. Eyewitness identification has to be carefully considered in view of things such as the lighting, the race of

the individual being identified versus the race of the person doing the identification, the time one has to see the individual, whether or not one has problems with their vision, the emotions or tensions that are aroused in people when they do the observation. As I said, visual problems and lighting are key factors.

Mr. Hernandez, who arrived somewhere between 5:30 and 5:40 at the 7-Eleven, had very good eyesight. He testified to the same. He is a relatively young man. This is consistent with the fact he has no eyeglasses or anything to enhance his ability to see.

He immediately, upon witnessing the event that was traumatic to him -- that is, the event of seeing another human being stomped and kicked -- reported it to the person who drove him to work. He believes he was driven to work about 5:35 or 5:40. In fact, the card for checking in at work shows 5:55. The events he observed, he believes, were some ten minutes or 12 minutes before that.

What attracted his attention was the sounds of kicking. This was not a friend of his, so he had no reason for his vision to be clouded by a lack of objectivity. He did not know the victim; he did not know the defendant.

What he saw was another human being on the ground bleeding. At one point I know he said he thought the face of the person on the ground was black because it was covered with

such dark blood. The man died near where he sat.

And this witness, Mr. Hernandez, identified the attacker as a male, a male black standing over the victim. He said he was approximately his height or a little bigger, muscular, had short hair and was in a light-colored T-shirt and white shorts and white tennis shoes, and that the shorts were loose, baggy-type shorts that came down below the knee.

Only one man in the videotape -- which covers the whole time frame at issue between the time that the victim arrived at the scene, and I believe that was 4:51, and the time that the police arrived, which was approximately 6:30 -- only one person matches that description, both in terms of their ethnicity, or color, in terms of their size, in terms of their manner of dress. And upon search of the place where the defendant was living, shorts that are similar to precisely what was described and a T-shirt similar, both freshly washed, were found.

The T-shirt is light blue, close to white. The shorts are light denim shorts. And they are the type that are traditionally worn by young people. By "young," I mean anybody under 40 -- that is to say, they are baggy. And when the detective held them up, they came below his knee. I note, for the record, the detective appears to be a taller person than the defendant.

Thus, the description of the shoes, the man's color,

et cetera, match. Then we have, again, the picture of the gentleman in the 7-Eleven picked up on the video.

There's the rough for the defendant. Because, yes, he could have been at the 7-Eleven like those other people in the early morning hours and no one would have ever known he was there. But he went in and out of the 7-Eleven not one time, as he said, but three times. And on one of those occasions a clear shot of him was taken. And there is no doubt about who it is.

Obviously, the fact that he was in the 7-Eleven doesn't make him guilty of the homicide. But it puts him at the scene of the crime at approximately the time when the crime occurred. When I say "approximately," we're talking within 10, 15 minutes. So we're not talking about a big expanse of time.

He does have short hair, unlike the other African-American who was in the videotape. He did have on a light T-shirt, unlike the other African-American who had a long-sleeved plaid shirt.

And, interestingly enough, among his personal effects, white tennis shoes were not found at the home where he was then living. The white tennis shoes would have been what, most likely, showed the signs of the homicide, being part of the attack weapon.

There is only one person who fit the description

given by Mr. Diaz-Hernandez, who said that not only did this individual go once to the body and assault the body violently but went into the store and came out and did it again. In this courtroom, Mr. Hernandez said he was not just of the opinion it was the defendant but that he was a hundred percent certain.

Again, I am aware of eyewitness identification and the problems that go along with it. This man, Mr. Hernandez, did not have a gun to his head. He was not the person suffering. He was not the person who was under the stress of the actions being directed at him. He had perfect eyesight. The photographs make it clear that, while the lighting was not perfect, given the hour, there was lighting close by in a variety of areas. That is clear from all of the photographic evidence.

He may not have recognized the defendant when shown a photo-spread where images all tend to be alike. And, quite frankly, this is a very good photo-spread in that all six images closely resemble one another, which is the aim of a photo-spread, not to taint or direct someone's identification.

Mr. Mellen, interestingly, had no trouble identifying the defendant from a photo-spread or in the courtroom. He identified him as the person who had been in the 7-Eleven on this occasion, on this morning. He remembered it particularly because the victim had made several unusual

requests: Could he sit outside, could he sit and smoke. He also had seen the victim there on different occasions, although never that early in the morning.

And he witnessed the defendant being picked up by someone. When he arrived at the store, Mr. Mellen, at approximately 5:20, there were no cars in the 7-Eleven parking lot. There were no cars at 5:30. But there was a black man in the store, and he describes that black man and positively identifies him as the defendant. And that man was in the store when Mr. Lundskog came in. The other black man who's on the video footage was not in the store at the same time as the victim.

The defendant was in the clothing described. Both were in the store together. And, in fact, he saw the defendant gesture to the victim in a motion, Come with me, after the victim had opened the door for the defendant.

They were not just both there at the same time; they interacted. And they left together. And after they left, no one saw the victim alive again. This is compelling. They passed each other.

But Mr. Mellen's testimony is more interesting even than that. And, to me, he may be the key witness in this case. He did not observe the crime but he observed events surrounding the crime that had considerable importance to me.

He observed that there was a great deal of tension

in the 7-Eleven. And that even he, a regular purchaser in that store or regular customer, felt uneasy and nervous. And that the defendant stared at him, what he referred to as "mad dogged" him.

This fact alone is not significant. But compiled or added to the rest of the evidence, it is extremely compelling. What reason would this African-American male have for giving someone this kind of attention and this look unless something was amiss?

And all of the other testimony of the other people working at the store, the other people who interacted with Mr. Hernandez, who picked him up and took him to work. And Detective Judd's testimony and the physical evidence that he found, the newly-washed clothing and the absence of the white shoes in the home where the defendant was then living.

And who among us doesn't have a pair of white athletic shoes in their home? I would be surprised if there were one person here who doesn't. That, to me, is distinctive as well. And I'm cognizant of the fact that a pair of tennis shoes turned up at another person's home sometime later that were identified as the defendant's, but that wasn't where the defendant was residing.

At 4:51 the victim entered. At 5:03 Mr. Lopez entered. At 5:23 a black man appears, and the defendant has acknowledged that he was that black man. At 5:22 Mr. Mellen

arrives. He sees the defendant and, subsequently, he sees the defendant and the victim interact.

Mr. Hernandez comes in and makes observations of his own and describes what must be the most horrific scene that one could imagine of one person directed at another human being -- not a single action displaying indifference to one's survival but a series of prolonged, direct, malevolent, criminal and homicidal actions toward another human being by repeated blows and stompings and kickings to the head area.

It is not just the photograph of the defendant in the store and the manner in which he treated Mr. Mellen and the fact that he engaged with the victim, it is the totality of the circumstances. And as the finder of fact, one of the things I have to consider is the appearance and demeanor of witnesses and their credibility.

I found both Mr. Hernandez -- who of course was reluctant initially to report this crime for obvious reasons, he's an illegal alien -- and Mr. Mellen to be particularly credible witnesses. They didn't wish to be here, but they were both here and they testified in an open, credible manner. They didn't have to search for information because they were telling the truth. That is my perception from watching them.

Additionally, the medical examiner's testimony is extraordinarily important, not only as to manner and cause of death but as to the significant amount of pain and the number

of blows that were directed at the victim.

And I look at Exhibit 28, a picture of the victim smiling in his ball cap and in his overalls, holding what appears to be his ubiquitous drink of choice, a big carbonated beverage. And I can't imagine why anyone would take the life of someone like this who looks as if he would have a hard time taking care of himself, let alone offer any kind of problem to any other human being.

And, finally, the defendant has not testified, nor do I consider that nor is it a factor in this. But I have observed throughout the trial the defendant's demeanor, which is one of a total lack of emotion, even when one listened to very painful evidence being adduced. And that, coupled with everything else, contributes to the verdict.

As I said, I believe that it is not one thing, one witness, one person, one piece of evidence, but the totality of the facts and evidence that make this case. The case was carefully tried by an excellent defense attorney who made excellent use of cross examination, and by two excellent prosecutors who have spent a great deal of time putting their case together. And it is my finding that the guilt of this defendant for the crime of homicide murder has been proven beyond a reasonable doubt.

I note that beyond a reasonable doubt does not mean shadow of a doubt, does not mean to an absolute certainty. It

means a doubt that a reasonable man or woman or many men and women could entertain. I have no reasonable doubt. That is the verdict.

May I ask the defendant to stand.

Sir, with great sorrow, I pronounce you guilty of the crime of homicide murder. And it's now important for you to understand that you have certain very important appellate remedies, remedies that I'm going to ask Mr. Gotay, who is a superb lawyer, to explain to you on the record.

Mr. Gotay.

MR. GOTAY: Yes. Well, your Honor, I don't know if you plan to give him the option if he wants to be sentenced today or a Presentence Report being done.

THE COURT: I'm going to get to that. But I want first for him to know about his rights of appeal because they interface with this verdict and the sentencing.

MR. GOTAY: You have 30 days to appeal the sentencing of the Court. Within that 30 days you can appeal this verdict by the Court to the appellate court based on legal matters, not factual matters.

THE COURT: I should indicate to you, sir, if you cannot afford the cost of appeal, the State will bear the cost. This is, as one defendant characterized it, a beginning. This is a legal right that you are entitled to utilize. If you feel the verdict is unfair, that there were

ADDENDUM C

76-5-203. Murder.

(1) As used in this section, "predicate offense" means:

(a) violation of Section 58-37d-4 or 58-37d-5, Clandestine Drug Lab Act;

(b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;

(c) kidnapping under Section 76-5-301;

(d) child kidnapping under Section 76-5-301.1;

(e) aggravated kidnapping under Section 76-5-302;

(f) rape of a child under Section 76-5-402.1;

(g) object rape of a child under Section 76-5-402.3;

(h) sodomy upon a child under Section 76-5-403.1;

(i) forcible sexual abuse under Section 76-5-404;

(j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;

(k) rape under Section 76-5-402;

(l) object rape under Section 76-5-402.2;

(m) forcible sodomy under Section 76-5-403;

(n) aggravated sexual assault under Section 76-5-405;

(o) arson under Section 76-6-102;

(p) aggravated arson under Section 76-6-103;

(q) burglary under Section 76-6-202;

(r) aggravated burglary under Section 76-6-203;

(s) robbery under Section 76-6-301;

(t) aggravated robbery under Section 76-6-302; or

(u) escape or aggravated escape under Section 76-8-309.

(2) Criminal homicide constitutes murder if:

(a) the actor intentionally or knowingly causes the death of another;

(b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;

(c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;

(d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense; and

(ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense;

(e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4; or

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;

(f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(3); or

(g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.

(3) Murder is a first degree felony.

(4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (4)(a)(i) emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter.

77-17-3. Discharge for insufficient evidence.

When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged.

Rule 52. Findings by the court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) *Waiver of findings of fact and conclusions of law.* Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

Rule 81. Applicability of rules in general.

(e) *Application in criminal proceedings.* These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.